United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7627

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Docket 75-7627

COMPANIA PELINEON DE NAVEGACION, S.A.,

Plaintiff-Appellant,

—against—

TEXAS PETROLEUM COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Statement

Judge Boldt's Findings of Fact and his oral memorandum decision do not support his conclusions in denying appellant recovery of lost profits directly caused by the casualty for which the appellee is liable. The Findings clearly require a conclusion that appellant should recover for the full period during which the CAPETAN MATHIOS was laid up under repair and for the period which appellant was deprived of the use of the vessel as a result of the off-hire extension required by the charter party in order to be fully compensated for its loss resulting from appellee's negligence.

Questions Presented

1. Is a vessel owner entitled to the lost profits for the adidtional time that he is required to extend the charter as a result of a casualty for which the appellee liable?

2. Is a vessel owner entitled to be compensated for the lost earnings under a charter party for the full time that the vessel is under repairs as a result of the casualty for which the appellee is liable when the vessel is, in fact, unseaworthy when it enters the yard for repairs and when it is not otherwise due or scheduled for repairs necessary to the seaworthiness of the vessel or required in the normal operation of the vessel?

3. Is the prevailing party of an action entitled to the costs of the action when there is no showing that there was some defection on the part of the prevailing party?

Specification of Errors

It is respectfully submitted that the District Court erred in:

1. Holding "plaintiff is not entitled to any alleged loss of profit or loss of charter hire for any part of the extension period" (Conclusion of Law 33, 260a*).

2. In adopting appellee's proposed conclusion that the loss during the extended period of the charter was "remote, unforeseeable and speculative" (Conclusion of Law 34, 260a).

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* References to Joint Appendix.

3. In holding that "the vessel owner is entitled to recover for loss of use only for that portion of the repair period that Tumaco related repairs extended the time within which owners work could have taken" (Conclusion of Law 30, 258a).

4. In failing to allow appellant's costs as the prevailing party against the appellee (Court's Oral Decision, 246a).

Facts

On September 29, 1972 the tanker CAPETAN MATHIOS was damaged at Tumaco, Columbia. She was owned by the appellant Compania Pelineon De Navegacion, S.A. and under charter to Gulf Oil Corporation (F.F.* 1, 249a; F.F. 7, 250a). Appellee Texas Petroleum Company, a subsidiary of Texaco, Inc., operated the sea berth at the time of the casualty and was responsible for the damage sustained by the CAPETAN MATHIOS (F.F. 1, 2, 249a; F.F. 23, 255a). The casualty caused the CAPETAN MATHIOS to become unfit for sea voyage and therefore, in fact, unseaworthy (Court's Oral Decision 243a; F.F. 13a, 253a), although an American Bureau of Shipping surveyor, after examining the vessel and the damage to the propeller and propeller guard and observing that the fair water cone was missing, issued a certificate of seaworthiness at the time of his inspection (F.F. 3, 249a; F.F. 5, 250a; F.F. 10, 251a).

Soon after the vessel left Tumaco, her master notified appellant that the vessel experienced some vibration and overheating in the tailshaft and sterntube bearing and

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* Findings of Fact.

appellant suggested a reduction in revolutions per minute of the propeller (Hatgis, 15a, Plaintiff's Exhs. 2, 3). A new fair water cone was ordered and the owner's agent notified the charterer that the vessel would be drydocked when the fair water cone was available some eight weeks later (Plaintiff's Exh. 18, 189a). The District Court found that the vessel was *in fact* unseaworthy at the time the vessel entered the yard for repairs in March of 1973 and that the unseaworthiness resulted from the casualty at Tumaco (Court's Oral Decision, 243a; F.F. 13(a) 253a). The District Court concluded as a matter of law that "plaintiff was under a non-delegable duty to exercise due diligence to make his vessel seaworthy," and held that "When a vessel has a certificate of seaworthiness from the American Bureau of Shipping or other authorized agency that of itself does not establish that the vessel is seaworthy" (Conclusion of Law 37(a), 37(b) at 262a). The Court then held that "The plaintiff was under a duty to investigate the extent of damage sustained in the Tumaco casualty and exercise due diligence to insure the seaworthiness of the vessel" (Conclusion of Law 37(c), at 262a).

Prior to the casualty of September 29, 1972, the vessel was last drydocked and overhauled from March 21 to April 26, 1972 and she was not again required to be drydocked until two years later in March or April of 1974 (Hatgis, 137a-138a). Appellant advised the charterer Gulf Oil Corporation in May of 1972 that it intended to drydock the vessel in the summer of 1973 at which time the charter was scheduled to be completed (F.F. 6, 250a; F.F. 7, 250a-251a).

When the new fair water cone was received from Europe in January 1973, the vessel was then scheduled for the

repair yard for late March 1973 (F.F. 11, 251a). At the time that the vessel went into the yard, she was not c. for drydocking, was not scheduled for drydocking for any owner's or classification work, and went into drydock for the purpose of repairing the damage sustained at Tumaco and replacing the fair water cone (Plaintiff's Exhs. 17, 18, 19, 20 and 20A at 188a-192a; Hatgis, 59a). The repairs, as a result of the Tumaco casualty, required the full time that the vessel was in the repair yard (Plaintiff's Exh. 9, 182a; Plaintiff's Exh. 11, 183a).

On completion of the repairs in April 1973, the vessel resumed her employment under the charter to Gulf Oil Corporation (F.F. 19, 254a). In May or June of 1973, appellant, after a financial analysis of the tanker market, decided not to enter into an extension or new time charter when the present charter was completed (Plaintiff's Exh. 14; Hatgis, 23a-25a). The equivalent World Scale charter rate for the Gulf charter was World Scale 120 and the market at the time was about World Scale 300 and improving (F.F. 22(a) at 256a; Hatgis, 22a-24a; Transcript of Trial, pp. 20-21).

On June 28, 1973, Gulf notified appellant that it was exercising its option under the charter party to add the off-hire period and extend the charter for the number of days for which the vessel was off-hire during the term of the charter, which included 25.179 days for the Tumaco casualty (F.F. 20, 254a; Plaintiff's Exh. 16, 187a).

Between the time the repairs were made to the CAPETAN MATHIOS in April 1973, and October 1973, the charter market for voyage charters from the Caribbean to Atlantic Coast United States Ports increased from World Scale 260 in mid-June 1973 to World Scale 450-500 in October 1973

and declined in the latter part of October and early November to World Scale 300-350 (F.F. 22(a), 256a). If the Tumaco casualty had not occurred, the CAPETAN MATHIOS would have been taken off the Gulf charter at the time she sailed from San Juan, Puerto Rico at 2345 hours on October 25, 1973 (Plaintiff's Exh. 32, 208a-213a; Transcript of Trial, pp. 210-211).

The vessel was withdrawn from Gulf's service under the charter on November 25, 1973 and thereafter was operated in the voyage charter market until August of 1974 (F.F. 21, 255a; F.F. 26, 257a).

Appellant lost $97,077.26 off-hire for the periods which the vessel did not operate for Gulf under the charter as a result of the Tumaco casualty and consequent repair period (Findings of Fact 16, 17 and 18; 252a-254a). For the period that the charter was extended as a result of the casualty, appellant made a profit of $54,874.22 (F.F. 20, 254a and F.F. 28, 258a; Plaintiff's Exh. 30, 207a; Hatgis 33a-34a). During the extended period of the charter, appellant was required to make two voyages for Gulf which, when computed at the average World Scale rate of 375 would have given appellant a profit of $390,516. (Plaintiff's Exh. 35, 214a). For two typical voyages that the vessel would have made from the Caribbean to the East Coast of the United States if the charter had not been extended, the loss of profit was computed to be $358,171. (Hatgis, 31a; Plaintiff's Exh. 35, 214a). The net loss of profit was calculated to be between $303,000 and $335,000 for the 25.179 day period of the extension of the charter which was a result of the casualty (Hatgis, 34a; Plaintiff's Exh. 30, 207a; Plaintiff's Exh. 35, 214a).

POINTS

I.

Appellant has not been compensated for the demonstrated and undisputed loss of use of the CAPETAN MATHIOS during the extended period of the Gulf charter resulting from the Tumaco casualty.

The parties stipulated in the Pre-Trial Order:

> "The time during which the vessel was having hull repairs made as a result of this casualty and the time the vessel was delayed at Tumaco as a result of the casualty amounted to 25.179 days came within the off-hire provision and the charterer exercised its option to extend the charter for the off-hire period of about 25 days."
>
> * * * * *
>
> "The CAPETAN MATHIOS would have completed its charter party commitment and all extensions, except that related to the Tumaco casualty by on or about October 30, 1973. The vessel came off charter after all extensions on November 24, 1973" (P.T.O.,* p. 3).

The District Court's conclusion that appellant "in effect seeks to have [appellee] pay twice for a single wrong" (Court's Oral Decision, 244a) is demonstrably wrong. If appellant had waited to repair the vessel until the Gulf charter was completed, it would have been in a position to recover for the loss of use of the vessel at the then existing market rate. In accordance with the foregoing stipulation, this would have been on or about October 30, 1973.

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* Pre-Trial Order dated June 27, 1973.

The appellant, in the exercise of diligence, prudence and caution, put the vessel in the yard as soon as the vessel was in position to be drydocked in Hoboken, New Jersey after the fair water cone was received (Plaintiff's Exhs. 18, 19, 20 and 20A at 189a-192a). Further examination at the drydocking revealed extensive concealed damage which could have caused a disaster (F.F. 13(a), 253a).

By acting prudently, the vessel was delayed in March/April 1973 for about 23 days required to make the repairs resulting from the casualty and appellant became contractually obligated to add the time lost to the end of the Gulf charter period (Plaintiff's Exh. 24, cl. 9 and 10 at 198a). The appellant not only lost the use of its vessel during the repair period and suffered a monetary loss equal to the time charter hire deducted under the Gulf charter, but also lost the *difference* between the Gulf charter rate received during the extension and the market rate the CAPETAN MATHIOS could have earned if she had been free of the 25.179 day extension (Stipulated Facts, P.T.O., p. 3).

The Gulf time charter was equivalent to World Scale 120 and that is the rate at which appellant was paid for the extension caused by the Tumaco casualty. CAPETAN MATHIOS could have made two voyages at an average of World Scale 375 if the casualty had not occurred and the appellant had been free to trade the vessel in the market (Plaintiff's Exh. 35 at 214a; Hatgis at 29a-30a). The Court found:

> "the charter market for voyage charters from Caribbean to Atlantic Coast United States Ports increased from World Scale 260 in mid-June, 1973 to 450-500 in October, 1973, an increase in tanker rates of 300 to 350 per cent * * * . The rates declined in the latter part

of October and early November to World Scale 300-350 * * *." (FF. 22(a), 256a).

For appellant to be made whole, it must receive its loss of profits during the extended period of the charter. More than 75 years ago in *The Conqueror*, 166 U.S. 110, 125 (1897) the rule in maritime cases was set forth:

> "That the loss of profits or of the use of a vessel pending repairs or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question." (p. 125).

The potential profits for the extended period were calculated on the basis of the Trial Court's finding that the tanker market advanced to World Scale 450-500 in October and declined to World Scale 300-350. Mr. Hatgis, a thoroughly knowledgeable chartering agent for appellant, testified that he could have fixed the vessel for two voyages at an average rate of World Scale 375 (Court's Oral Decision at 238a; Hatgis at 29a-30a). His calculation for the two voyages the vessel could have made resulted in a loss of profit of $303,297 (Plaintiff's Exh. 35, 214a; Hatgis at 32a-34a).

Mr. Robert Gringrow, who was employed by Texaco, Inc., appellee's parent, for thirty years and involved in chartering vessels for 18 years, directed the chartering of tankers and managed the division, sat at appellee's counsel's table during the trial and heard Mr. Hatgis' testimony (164a-166a). He was not called as a witness for appellee to dispute any of Mr. Hatgis' testimony. This is understandable in that the record of vessels chartered for the Texaco com-

panies in October/November 1973 market shows that he chartered in vessels for his company at World Scale 350-450 (Plaintiff's Exh. 12, p. 5). The Trial Court "didn't see anything especially significant one way or another concerning" Mr. Gringrow (240a).

II.

Appellant's loss of profit during the extended period of the charter was neither remote, unforeseeable or speculative.

The District Court's conclusion that the loss of profit sustained by appellant during the extended period of the Gulf charter was too unforeseeable, remote and speculative to properly be recoverable in this tort action is in conflict with the rule in this Circuit that damages need not be foreseeable in order to be recoverable. (Conclusion of Law 34, 260a). In *Petition of Kinsman Transit Company,* 338 F.2d 708 (2 Cir.) *cert. denied sub nom. Continental Grain Co.* v. *City of Buffalo,* 380 U.S. 944 (1965), this Court rejected the contention that because the precise damages incurred were not foreseeable, the defendants were not liable:

> "The oft encountered argument that failure to limit liability to foreseeable consequences may subject the defendant to a loss wholly out of proportion to his fault seems scarcely consistent with the universally accepted rule that the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent susceptibility of the plainly renders this far more serious than could reasonably have been anticipated." (338 F.2d at 724.)

Here, the "latent susceptibility" of appellant was its contractual obligation to extend the period of the charter by any time lost during the term of the charter. This obligation had been incurred long before the collision took place, and appellant had no more freedom of choice in the matter of the extension then it did in altering the low rate to which it was bound under the charter. Appellee cannot complain that the damage was caused by the contract provision between appellant and Gulf. As stated in Hart and Honoré, *Causation in the Law*, 1967:

> "Similarly it is settled law that the owners of a ship damaged through defendant's negligence can recover damages on the basis of the actual contract or charter on which she is engaged. This appears to be the case even if the contract contains onerous clauses which make the owners exceptionally vulnerable to delay." (at p. 163).

See also Harper & James, *The Law of Torts*, Vol. 2, 1956, §20:

> "Foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen." (p. 1147).

See *Leasco Data Processing Equipment Corp.* v. *Maxwell*, (2 Cir., 1972), 468 F.2d 1326, 1335; *Hall* v. *E. I. DuPont de Nemours & Co., Inc.*, (E.D.N.Y., 1972), 345 F. Supp. 353, 362. But for the Tumaco casualty the CAPETAN MATHIOS would have been returned to appellant by on or about October 30, 1973 (Pre-Trial Order, p. 3). The Court in *The Yaye Maru*, (4 Cir., 1921), 274 Fed. 195, 200 held:

> "If the owner of the Yaye Maru was bound to allow the off-hire in dispute, it was an element of the dam-

> age caused by the wrongful act of the War Lark, and the latter must respond."

The damage sustained during this period was in fact foreseeable by appellee. It was foreseeable that damage to the vessel would result in loss of use of the CAPETAN MATHIOS and loss of profits from that use. It was also foreseeable that the vessel could be operating under a time charter with an extension clause. Texas' own parent company Texaco, and other standard tanker time charter forms have in their printed form of charter parties the off-hire and extension clauses involved here (198a, Plaintiff's Exh. 24, clauses 9 and 10; Defendant's Exh. K, clauses 1 and 11).

Appellant's lost profit is neither unforeseeable nor remote.

Appellant is not required to prove its loss with the exactitude set forth by the District Court. Maritime law does not require such exact determinations of lost profits, precisely because of the difficulties noted by the District Court in its Conclusion of Law 35 (260a-261a). All one need show is that "profits have actually been, or may be reasonably supposed to have been, lost . . . ". *The Conqueror,* 166 U.S. 10, 125 (1897); see also, *The Potomac,* 105 U.S. 630, 631-632 (1881); *The Gylfe* v. *The Trujillo,* (2 Cir., 1954), 209 F.2d 386.

This Court has clearly defined the burden of proof which appellant must meet in *The North Star,* (2 Cir., 1907), 151 Fed. 168:

> "In ascertaining whether earnings have been lost by the owner, the inquiry is not whether they could possibly have been made by the use of the vessel during the

> period for which he has been deprived of her use, but is whether they would have been made. As it cannot be proved that they would have been certainly made . . . it suffices if the fact is proved circumstantially and with a reasonable degree of certainty . . . It is not necessary for him to show by direct evidence that he would have employed his vessel or his property during the period in such a way that earnings would have accrued to him . . . It suffices if he shows a state of facts from which a court or jury can find that there was an opportunity for him to do so, and that he would probably have availed himself of it." 151 Fed. at 175.

See also, *Ove Skou* v. *United States*, (5 Cir., 1973), 478 F.2d 343 and cases cited therein.

The rule regarding certainty of damages was set forth by the Supreme Court in *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 at 562 (1931):

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

In an action for lost profits, precise determination of the amount is not required.

> "It is not necessary that profits should be susceptible of exact calculation, or of mathematical precision, accuracy or nicety; it is sufficient that there is data from which they may be ascertained with a reasonable degree of certainty and exactness, or with such reasonable degree of certainty as the situation permits." 25 C.J.S. Damages, §42, p. 738.

WORLD SCALE MARKET RATES FOR 10/9/73-11/6/73

		World Scale Rate
10/ 9/73	Agia Barbara to Texaco	407½
10/10/73	Hilda	575
	Ariston	400
10/11/73	TBN to Texaco	440
	Mercury to Texaco	430
10/12/73	Capetan Georgios	440
10/15/73	Buena Suerte to Texaco	420
10/16/73	Marianna to Texaco	450
10/17/73	Tank Monarch	430
10/18/73	Pelopidas	425
	TBN to Texaco	420
	Mauritius	425
10/19/73	Agia Barbara	425
	Speedway	420
10/23/73	Stephanie Conway to Texaco	420
	Thomas M	400
10/24/73	Perseus I	370
10/25/73	TBN	350
10/26/73	Virgo	300
10/29/73	Stephanie Conway	430
10/30/73	Barbara Jan	300
	Samuel Ugelstad	480
10/31/73	Matarangi	275
	Port Miguel	275
11/ 2/73	Teta M	275
	Delian Spirit	300
	Marianna	300
11/ 5/73	Cabinas (R)	282½
11/ 6/73	Aro	295
Total Fixtures 29	Total World Scale	1,1059

Average World Scale Rate per fixture—381.34

Appellee's arguments adopted verbatim by the District Court are without legal precedent or support. Appellee argues that the extent of the profits cannot be ascertained because the charter market is a high risk industry with numerous factors to be considered in determining profits. That argument was knocked down in *Natco, Inc.* v. *Williams Brothers Engineering Company,* (5 Cir., 1974), 489 F.2d 639.

The proofs submitted by appellant to the District Court satisfy the burden required by the maritime law. The District Court found that the World Scale market rate for tankers of comparable size to the CAPETAN MATHIOS was World Scale 300-350 in the latter part of October and early November (Finding of Fact 22(a) 256a). The availability of charters is shown in Plaintiff's Exhibits 12 and 13. Plaintiff's Exhibit 12, p. 5, shows six tankers of comparable size to the CAPETAN MATHIOS which were chartered by Texaco, the parent company of Texas, in the last half of October and early November at rates ranging from World Scale 350 to 450, all of them in the Caribbean-U.S. East Coast trade, as was the CAPETAN MATHIOS. The table on the opposing page is a compilation made from Plaintiff's Exhibit 13 of 29 "dirty" tankers of a size comparable to the CAPETAN MATHIOS, fixed on the spot voyage market between October 9, 1973 and November 6, 1973 for Caribbean-U.S. East Coast voyages, which shows an average World Scale rate of 381.34 per fixture.

Appellant's calculation of its lost profit at World Scale 375 for the extended period of the charter is wholly consistent with the market rates. It cannot be disputed that if the casualty had not occurred, CAPETAN MATHIOS would have been "active in a ready market." *Ove Skou* v. *United States, supra.*

III.

The disallowance of four days charter hire for owner's work carried on while the CAPETAN MATHIOS was in the shipyard for the repairs as a result of the Tumaco casualty was improper.

The Trial Judge in his Oral Decision and Findings of Fact found that:

> "[A]t sometime prior to the drydocking referred to, the Tumaco casualty caused the CAPETAN MATHIOS to become unfit for sea voyage and therefore, in fact, unseaworthy" (243a).

> "The damage found at Hoboken consisted of damage to the tailshaft keyway and a kink or bend in the tail shaft and the three dowel pins connecting the inner geared ring of the low-pressure turbine flexible coupling were completely sheared. The force of the impact caused the quill shaft to rotate within the flexible coupling flange approximately one-third of a turn. * * * Had the vesel continued to operate in its damaged condition, it was possible there would have been complete slippage of the shaft and a disaster could have occurred * * * . All the damage discovered resulted from the casualty which occurred at Tumaco on September 29, 1972 * * * " (F.F. 13(a), 253a).

> "[I]n fact, the owners of the vessel did not know it was unseaworthy at the time it entered the drydock at Hoboken and did not put the vessel in drydock for the purpose of repairing unseaworthy conditions" (243a).

"6. Prior to the casualty of September 29, 1972, the vessel owner intended to drydock the CAPETAN MATHIOS in the summer of 1973" (250a).

The District Court's error in disallowing the four days is made obvious by its conclusions of law wherein it was held that:

"37a. Plaintiff was under a non-delegable duty to exercise due diligence to make his vessel seaworthy" [citations omitted] (262a).

"37b. When a vessel has a certificate of seaworthiness from the American Bureau of Shipping or other authorized agency that of itself does not establish that the vessel is seaworthy" [citations omitted] (262a).

The vessel owner was on notice that all was not right with the vessel when her master radioed on October 23, 1972 that the vessel was experiencing vibrations and overheating of the stern tube bearing (Plaintiff's Exh. 2). The owner ordered a reduction in revolutions (Plaintiff's Exh. 3) which apparently overcame the symptoms and the drydocking of the vessel was delayed until a new fair water cone was manufactured in Norway and shipped to the Bethlehem Steel Corporation shipyard in Hoboken, New Jersey where the vessel was drydocked (Plaintiff's Exh. 19; Defendant's Exh. U, 190a, 234a).

The ultimate result of the decision below is that the owner is condemned for attempting to mitigate the damages by delaying the drydocking until the fair water cone was ready for installation and penalized four days charter hire because of "plaintiff's long and unreasonable delay in drydocking his vessel" (243a).

The vessel was not scheduled for drydocking until the summer of 1973. The owner's concern in obtaining the earliest possible drydocking date is set forth in its teletype message to Gulf on November 20, 1972 requesting Gulf to schedule the vessel for drydocking in mid-January 1973 "in order to effect repairs to the damages caused while docking at the Texaco installation at Tumaco on September 29." (Plaintiff's Exh. 19, 190a).

The District Court recognized the prudence in drydocking the vessel for the Tumaco repairs. Its conclusion that four days should be deducted from the time required to make the Tumaco repairs is inexplicable. The "substantial repairs, not chargeable to the Tumaco casualty," to which the Court referred, are set forth in Plaintiff's Exhibit 25 (205a) and amount to $3,535. and included only $1,705 for repair to a boom taken off the ship and repaired ashore, $490 for cleaning sea chest strainers and $300 for installing insulation on the generator steam turbine casing. As to that bill, the Trial Judge remarked at the trial:

"You couldn't do very much repairing for that" (36a).

In any event, the law has been well established in this Circuit in the *Clyde S.S. Co. v. City of New York*, (2 Cir., 1927), 20 F.2d 381:

> "If the owner of a damaged vessel puts her in drydock to repair damages done by a collision, and while she is there seizes the opportunity to make other repairs, which do not extend the time consumed in the collision repairs, the tort-feasor may not abate his damages . . . In such a case the tort-feasor cannot truly say that the detention and therefore the loss would have been

> less, had the owner deferred his own repairs . . . It must be treated as a matter of indifference to the tort-feasor that the owner gets an incidental benefit from the detention. He has as much lost the use of his vessel as though he did not make his own repairs, and he is not under any duty to share his windfall with the tort-feasor." (p. 381).

The law is the same in the Fifth Circuit. In *Delta Marine Drilling Company* v. *M/V Baroid Ranger*, (5 Cir., 1972), 454 F.2d 128 the extent of the collision damage was not realized until twenty-two days after the collision. The vessel immediately commenced repairs upon discovery of the damage, and also effected some repairs unrelated to the collision damage. The Court allowed recovery for lost profits stating:

> "The district court concluded, and we agree, that the non-collision repairs performed here were performed simultaneously with collision repairs and did not extend the time of detention beyond that which was required for collision repairs. In these circumstances a vessel owner may recover for the full detention." (p. 131).

The repair period tentatively scheduled for the summer of 1973 has no bearing on the repair period required for the Tumaco repairs. In *Atlantic Refining Co.* v. *Matson Navigation Co.*, (E.D. Pa., 1957), 150 F. Supp. 516, aff'd (3 Cir., 1958), 253 F.2d 777, the Court said:

> "The rule would seem to be this: If as the result of a tort a ship sustains damage which renders it unseaworthy, i.e. unfit for sea voyage, the owner can recover from the tort-feasor the drydocking costs incurred

> while the repairs were being made, even though at the time the tort was committed a drydocking had been scheduled in the nea. 'uture for other purposes." 150 F. Supp. at 518.

In affirming, the Court of Appeals stated:

> "The circumstance that simultaneously appellee was able to attend to the ship's checkup and other repairs was merely a fortuitous event legitimately taken advantage of by appellee." (253 F.2d at 779).

Capetan Mathio's owner took advantage of the time the vessel was laid-up under repair to perform minimal maintenance while the Tumaco damage was being repaired.

> "There was no showing that plaintiff's repairs effected at Hoboken extended the detention period beyond the time necessary to repair the Tumaco damage." (Oral Decision, 244a).

On the foregoing it is crystal clear that the District Court erred as a matter of law in charging four days off-hire to the vessel owner when the purpose of the repair period was to make the repairs made necessary by the Tumaco casualty. Appellant should recover $97,077.26 with interest thereon from March 29, 1973.

IV.

The District Court erred in failing to allow appellant costs as the prevailing party.

Judgment was entered in the District Court in favor of appellant for $75,258.05. The Federal Rules of Civil Procedure, Rule 54(d) provides:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . ."

The last phrase of the quoted portion vests discretion in the trial court to allow or disallow costs, see *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 284 (1946); *Farmer* v *Arabian American Oil Co.*, 379 U.S. 227, 232 (1964). This Court in *Trans World Airlines, Inc.* v. *Hughes,* (2 Cir., 1975), 515 F.2d [illegible], has held that such discretion is not to be exercised arbitrarily:

> "While, to be sure, costs are allowable in the exercise of the district court's discretion, that discretion must not be exercised arbitrarily; 'Discretion without a criterion for its exercise is authorization of arbitrariness.' Brown v. Allen, 344 U.S. 443, 496, 73 S. Ct. 397, 441, 97 L. Ed. 469 (1953). The district court sets forth no criterion for the disallowance of this item of costs." (p. 178).

In this case, no reason was given for denying appellant, the prevailing party, the costs of the action below.

Even though not successful on all of the claims presented, appellant is still the prevailing party. See 6 Moore's Federal Practice, §54.70[4], pp. 1306-1307:

> "In general, a party in whose favor judgment is rendered by the district court is the prevailing party in that court, plaintiff or defendant, as the case may be. Although a plaintiff may not sustain his entire claim, if judgment is rendered for him he is the prevailing party."

See also, *Lewis* v. *Pennington*, (6 Cir., 1968), 400 F.2d 806 at 820, *cert. den.*, 393 U.S. 983 (1968), U.S. *reh. den.* 393 U.S. 1045 (1969).

The Court of Appeals for the Seventh Circuit and the Sixth Circuit have ruled that "the prevailing party is *prima facie* entitled to costs and it is incumbent on the losing party to overcome the presumption." *Popeil Brothers, Inc.* v. *Schick Electric, Inc.*, (7 Cir., 1975), 516 F.2d 772, 775; *Lichter Foundation, Inc.* v. *Welch*, (6 Cir., 1959), 269 F.2d 142, 146; *Lewis* v. *Pennington*, (6 Cir., 1968), 400 F.2d 806, 819, *cert. den.*, 393 U.S. 983 (1968), U.S. *reh. den.*, 393 U.S. 1045 (1969).

In an effort to reduce the costs of the action, appellant filed and served upon appellee a Request to Admit, pursuant to Rule 36 of the Federal Rules of Civil Procedure, requesting an admission that the CAPETAN MATHIOS was *in fact* unseaworthy as a result of the casualty at Tumaco. (Request to Admit, 7a). This Request was made long after the repair period at Hoboken when appellee was fully aware of the extent of the damage found but nevertheless refused to admit the fact. (Answer to Request to Admit,

9a.). Because of the refusal to admit this fact, appellant was required to incur the expense of obtaining expert testimony from Mr. Pillatt (92a) on the condition of the CAPETAN MATHIOS and the District Court found in accordance with the Request to Admit (243a; F.F. 13(a), 253a).

The denial of costs to the appellant as the prevailing party in the District Court is an unjustified penalty.

In *Chicago Sugar Co.* v. *American Sugar Refining Co.*, (7 Cir., 1949), 176 F.2d 1, 11, *cert. den.*, 338 U.S. 948 (1950) it was said:

> "As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case."

See also *Esso Standard (Libya), Inc.* v. *S.S. Wisconsin*, (S.D. Tex., 1971), 54 F.R.D. 26, 27.

Appellant has done nothing to deserve the imposition of the penalty of denial of costs, and there are no grounds for the District Court's action in doing so.

Appellant should be allowed its costs in the District Court.

CONCLUSION

The District Court's decision should be modified to allow appellant to recover its lost profits during the extended period of the charter, the four days charter hire charged to appellant, with interest on both, together with its costs as the prevailing party.

Respectfully submitted,

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